STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 25, 2006
v	No. 259436 Oakland Circuit Court
DIONNE DAVON JORDAN, Defendant-Appellant.	LC No. 2004-195148-FH

Before: Cavanagh, P.J., and Fort Hood and Servitto, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2), and second-degree criminal sexual conduct, MCL 750.520c(1)(c).[1] He was sentenced as an habitual offender, fourth offense, MCL 769.12, to consecutive prison terms of 7-1/2 to 25 years for the first-degree home invasion conviction and 3 to 15 years for the second-degree criminal sexual conduct conviction. He appeals as of right. We affirm.

Defendant's convictions arise out of his entry into a neighbor's apartment. Defendant was high on drugs and did not want to return to his own apartment when his family was at home. Defendant knocked on the victim's door. The victim's daughter was unable to ascertain who was present at the door and opened it. The victim testified that defendant did not have her permission to enter. The victim also testified that defendant made inappropriate comments to her and touched her inappropriately. The victim called friends of hers to the apartment, and defendant was observed taking a roll of quarters. Because of defendant's erratic behavior and his failure to leave the apartment, police were called. Defendant acknowledged that he was high on drugs, but denied any intent to steal or any inappropriate contact.

I

Defendant initially argues that his jury was improperly instructed on the elements of first-degree home invasion. He claims that the trial court improperly combined two types of

[1] Defendant was also convicted of illegal entry without the owner's permission, MCL 750.115(a), and assault and battery, MCL 750.31. These convictions were "rescinded" by the prosecutor before sentencing.

proscribed conduct under MCL 750.110a(2) into one instruction. Because defendant cites no specific authority in support of his position that the combining of the two forms of proscribed conduct constitutes error requiring reversal, and his analysis of this issue is conclusory and punctuated only by citation to general rules of law, this issue is abandoned. A party may not announce his position and leave it to this Court to discover and rationalize the basis for his claims. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Moreover, defendant expressed satisfaction with the jury instructions. Therefore, defendant waived review of this issue. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000).[2]

II

Defendant next argues that it was improper for the trial court to instruct the jury that he could be convicted of first-degree home invasion if he entered the victim's dwelling with the intent to commit a felony, larceny, or an assault. He argues that the trial court only had jurisdiction over crimes for which he was charged and that he was only charged with first-degree home invasion on the theory that he entered the apartment without permission and, while entering, present in, or exiting, committed a felony, larceny, or an assault. While we agree that defendant was bound over for trial only on the theory that he entered the victim's apartment without permission and, while there, committed a felony, larceny, or an assault, the issue is also waived on appeal. *Carter, supra*. Upon jury inquiry, defendant specifically agreed that the prosecutor had to prove either that he entered with the intent to commit a felony, larceny, or an assault, or that he committed a felony, larceny, or an assault while there. Defendant cannot now argue that the jury could not consider the former theory. An expression of satisfaction with respect to a trial court's jury instruction effects waiver of the issue. *Id.* at 219; *Matuszak*, *supra.* Once waived, there is no issue to review. *Carter, supra.* Even if we considered this issue, there is no error requiring reversal. Defendant cannot demonstrate that he was prejudiced by the instruction. *Matuszak, supra*. The jury determined that defendant committed both an act of second-degree criminal sexual conduct and an assault against the victim while in her apartment. Thus, there is no doubt that defendant's conviction for first-degree home invasion was based on the theory for which he was bound over for trial. Defendant cannot meet his burden of persuading this Court that the alleged erroneous instruction affected the outcome of his trial. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

III

Defendant argues that there was insufficient evidence to support his conviction of first-degree home invasion. Specifically, he claims that there was insufficient evidence that he entered the victim's apartment without permission. When reviewing the sufficiency of the

[2] Even if we were to review the unpreserved claim of instructional error for plain error, *People v Matuszak*, 263 Mich 42, 48; 687 NW2d 342 (2004), the jury was not misled by the instruction. It convicted defendant of actually committing a second-degree criminal sexual conduct and an assault, both of which occurred while he was present in the apartment. It is clear from the jury's verdict that the jury did not convict defendant of first-degree home invasion on the basis of a finding that he only intended to commit the specified crimes. Alternatively then, plain error could not be established.

evidence in a criminal case, we "view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). All conflicts with regard to the evidence must be resolved in favor of the prosecution, *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997), and we resolve credibility conflicts in support of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). A victim's testimony alone, if believed, may be sufficient. See *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990).

The victim testified that she told her daughter to open the door to see who was there. When the door was opened, defendant "just came walking in." He was not given permission to enter the apartment, was not invited in, and was not given any type of signal that he may enter. This testimony alone was sufficient, if believed, to support that defendant entered without permission. *Id.* However, this testimony did not stand alone. The victim's daughter testified that when she opened the door, defendant entered without saying anything. She did not invite him into the apartment and did not know who he was. She also testified that when she opened the door, the victim did not call out any type of greeting to defendant. Regardless of defendant's testimony to the contrary, that he believed he was welcome to enter, the testimony offered at trial, when viewed in a light most favorable to the prosecution, clearly supported that defendant entered without permission.

IV

Defendant additionally challenges the trial court's alleged failure to properly respond to jury questions during deliberation. The issue is waived, and there is no error to review. *Carter, supra*. The trial court record demonstrates how the trial court handled jury questions during deliberation. Written questions were taken from the jury, answered on paper when possible, and initialed by both attorneys and the court clerk. If the questions required a verbal answer, the jury was called to the courtroom and a record was made of the proceeding. At 3:30 p.m., on October 15, 2004, the jury sent a written note inquiring whether permission to enter could be implied or whether it needed to be specific. A reply was handwritten on the note and indicated that the jury should "read the instructions." This note is initialed by both attorneys. At 4:05 p.m., the jury sent a second written note and asked whether permission could be implied or if it had to be overt relative to entry of the dwelling. A handwritten reply informed the jury to "see instructions." This note is also initialed by both attorneys. The fact that counsel initialed the notes to the jury, which answered the questions posed, effected a waiver of the issue whether the trial court appropriately handled the jury's questions. *Id.* (an expression of satisfaction with respect to a trial court's jury instruction effects waiver of the issue).

V

Defendant argues that he was denied his right to a unanimous jury verdict because the trial court failed to instruct the jury that it had to unanimously agree on which underlying acts were committed by defendant to support a finding of first-degree home invasion. Defendant failed to request a special unanimity instruction and never objected to the trial court's failure to include one. Thus, the issue is unpreserved, and we review it for plain error. *Carines, supra.*

Criminal defendants are entitled to unanimous jury verdicts. MCR 6.410(B); *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994). It is the duty of the trial court to properly instruct the jury on the unanimity requirement. *Id.* at 511. In some circumstances, a general unanimity instruction is insufficient to protect the defendant's rights. *People v Gadomski*, 232 Mich App 24, 30; 592 NW2d 75 (1998). In *Cooks, supra* at 512, our Supreme Court held that "a specific unanimity instruction is not required in *all* cases in which more than one act is presented as evidence of the actus reus of a single criminal offense." In *Cooks*, the victim testified about three materially similar sexual acts, but the defendant was only charged with one act. In discussing the necessity of a special unanimity instruction, the Court cited with approval several decisions from other jurisdictions involving the "continuing offense" exception, i.e., where two offenses are so closely connected in time that they form one transaction, where alternative acts are presented as evidence of a single offense, or where the offense consists of a continuous course of conduct. *Id.* at 519-524. The Court concluded:

> We are persuaded by the foregoing federal and state authority that if alternative acts allegedly committed by defendant are presented by the state as evidence of the actus reus element of the charged offense, a general instruction to the jury that its decision must be unanimous will be adequate unless 1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt. [*Id.* at 524.]

In rejecting that a specific unanimity instruction was required, the Court noted that defendant did not present a separate defense for the multiple acts presented to the jury. *Id.* at 528. In addition, he did not offer materially distinct evidence of impeachment regarding any particular act. *Id.*

In this case, the trial court did not instruct the jury that it had to unanimously agree whether defendant committed or intended to commit a felony, a larceny, or an assault in order to convict him of first-degree home invasion. All three underlying crimes were at issue in the case. Because the underlying crimes that supported the first-degree home invasion were materially distinct and different proofs were offered for each of those crimes, a special unanimity instruction was appropriate. *Cooks, supra.* However, any error in this regard does not require reversal in this case. The jury unanimously convicted defendant of second-degree criminal sexual conduct and assault as separate offenses, and it acquitted defendant of larceny. There is no reason to believe that the jurors disagreed about the factual basis of defendant's guilt for the crime of first-degree home invasion. In other words, it can be clearly deduced from the jury's verdicts that defendant was convicted of first-degree home invasion because the jury unanimously concluded that he committed both a felony and an assault while present in the victim's apartment. See *People v Rand*, 397 Mich 638, 643; 247 NW2d 508 (1976) (a jury verdict is not void for uncertainty if the jury's intent can be clearly deduced by reference to the pleadings, the court's charge, and the entire record.) All of the crimes underlying the charge of first-degree home invasion were part of a continuous course of conduct, and defendant did not present separate defenses for either assault or criminal sexual conduct. Rather, he claimed that he did not inappropriately touch the victim during the incident. The jury clearly rejected this claim. On this record, the outcome of defendant's case was not affected by the trial court's

failure to provide a specific unanimity instruction. Thus, reversal is not required. *Carines, supra.*

VI

Defendant challenges the trial court's failure to sua sponte provide a limiting instruction with respect to defendant's prior "bad acts," which occurred when defendant was in the victim's apartment on a prior occasion. The trial court was under no obligation to provide a limiting instruction in the absence of a request for such an instruction. *People v Rice (On Remand),* 235 Mich App 429, 444; 597 NW2d 843 (1999). Further, while defendant speculates that the failure to provide a limiting instruction may have affected the outcome of his trial, he offers no evidence that he was prejudiced by the lack of a limiting instruction. Thus, even if a limiting instruction was warranted, defendant has not demonstrated the existence of plain error affecting his substantial rights. *Carines, supra.*

VII

Defendant argues that the prosecutor engaged in misconduct during his closing argument when he argued facts not in evidence and misled the jury with respect to the law on second-degree criminal sexual conduct. Where, as here, a defendant fails to object to the prosecutor's conduct, the issue is reviewed for plain error affecting substantial rights. *People v McLaughlin,* 258 Mich App 635, 645; 672 NW2d 860 (2003), citing *Carines, supra* at 752-753, 764. There must be a showing of prejudice to warrant reversal, meaning that any error must have affected the outcome of trial. *McLaughlin, supra.* No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Watson,* 245 Mich App 572, 586; 629 NW2d 411 (2001).

A prosecutor may not make a statement of fact that is unsupported by the evidence. *People v Ackerman,* 257 Mich App 434, 450; 669 NW2d 818 (2003). In this case, the prosecutor argued that the victim and her daughter testified that nobody answered when the daughter asked who was at the door. We agree that the testimony at trial did not support this statement. The daughter testified that no one answered when she inquired who was at the door, but the victim testified only that her daughter could not understand the answer of the person at the door. Although the argument misstated the testimony, reversal is not required. A timely instruction could have cured any prejudice had one been requested. *Watson, supra.* Furthermore, the trial court instructed the jury both that the case had to be decided on the evidence and that the arguments of the attorneys were not evidence. Thus, any prejudice was effectively cured by the jury instructions.

Defendant also argues that the prosecutor misled the jury about the law when he indicated that, if the jury believed the victim's testimony that defendant attempted to touch her inner thigh, second-degree criminal sexual conduct would be proven. Defendant argues that a conviction could not be based on his intent to commit criminal sexual conduct. The prosecutor made the argument when he was explaining the concept that the victim's testimony alone could support a finding of the elements of the charged crime. It was not made in the context of outlining the elements of second-degree criminal sexual conduct. Thus, there was no conscious intent by the prosecutor to mislead the jury on the elements of the crime. More importantly, the jury was properly instructed by the trial court about the elements of the charged criminal sexual conduct

crimes, and it was instructed that it had to apply the law, *as provided by the trial court,* to the facts of the case. The jury was further instructed that the arguments of the attorneys were not evidence to be considered in determining whether the charged crimes were committed. Under the circumstances, defendant was not prejudiced by the prosecutor's argument. Thus, no plain error requiring reversal exists. *McLaughlin, supra*; *Watson, supra.*

VIII

Defendant next argues that he was deprived of the effective assistance of counsel because trial counsel failed to object to erroneous jury instructions, failed to object to the prosecutor's misconduct, and failed to object to the admission of evidence of his prior criminal activity. Our review of this claim is limited to errors apparent on the record because no *Ginther*[3] hearing was held. *People v Williams,* 223 Mich App 409, 414; 566 NW2d 649 (1997). In order to prevail on a claim that counsel was ineffective, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *People v Stanaway,* 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens,* 446 Mich 298, 303; 521 NW2d 797 (1994).

Defendant has not met his burden in this case. While defendant argues that counsel was ineffective for failing to object to erroneous jury instructions, he fails to argue or support that, but for counsel's performance, there is a reasonable probability that the result of the proceeding would have been different. *Stanaway, supra.* And, for the reasons previously discussed, there is no basis for concluding that an objection to the jury instruction regarding first-degree home invasion or the trial court's responses to jury questions, or that a request for a specific unanimity instruction would have changed the outcome of this case.

Defendant additionally argues that counsel was ineffective for failing to object to prosecutorial misconduct. Again, however, defendant has not argued or supported that, but for counsel's failure to object, there is a reasonable probability that he would have been acquitted. *Id.* Moreover, as previously discussed, the prosecutor's misconduct was effectively cured by the trial court's jury instructions. Thus, defense counsel's failure to object to the challenged remarks and obtain another curative instruction would not have changed the outcome of the trial. *Id.*

Finally, we find no merit to defendant's argument that counsel was ineffective for failing to object to the evidence of his prior bad acts, which occurred on his first visit to the victim's apartment. As a matter of trial strategy, defense counsel embraced the admission of the challenged evidence. The first incident was peripherally raised by the prosecutor during the direct examination of Annette Haworth. The tape of Annette's emergency telephone call was played for the jury, and Annette mentioned to the 911 operator that "this" had happened on another occasion. Not only did defense counsel fail to object, but he elicited explicit details about the first incident when conducting his cross-examination of Annette. Thereafter, both the

[3] *People v Ginther,* 390 Mich 436, 441; 212 NW2d 922 (1973).

prosecutor and defense counsel explored the issue with the victim and, later, the prosecutor questioned defendant about the earlier incident. In closing argument, defense counsel used the incident to segue into his argument that defendant thought he had permission to enter the victim's apartment on August 6, 2003. Defendant was in the victim's apartment on another occasion with permission, and she allowed him to use the telephone at that time. Given that the exploration of the issue of defendant's prior bad acts and the use of that evidence was a clear matter of trial strategy, we cannot conclude that defense counsel's failure to object to the evidence requires reversal. This Court will not second-guess counsel on matters of trial strategy. *People v Knapp*, 244 Mich App 361, 386 n 7; 624 NW2d 227 (2001). "[E]ven if defense counsel was ultimately mistaken [with respect to a strategic decision], this Court will not assess counsel's competence with the benefit of hindsight." *Id.*, quoting *Rice, supra* at 445.

IX

Defendant also argues on appeal that the cumulative effect of the errors at trial warrants reversal. We have found no errors of consequence, which cumulatively denied defendant a fair trial. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999); *People v Miller (After Remand)*, 211 Mich App 30, 43-44; 535 NW2d 518 (1995).

X

Finally, defendant argues that the trial court erred as a matter of law when it ordered his sentence for second-degree criminal sexual conduct to be served consecutive to his sentence for first-degree home invasion. This unpreserved issue, which presents an issue of law, is without merit. "In Michigan, concurrent sentencing is the norm, and a court may impose consecutive sentences only if authorized by statute." *People v St John*, 230 Mich App 644, 646; 585 NW2d 849 (1998). MCL 750.110a(8) permits a trial court, in its discretion, to order a term of imprisonment for first-degree home invasion to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction. *Id.* We reject defendant's unsupported argument that he was not sentenced for first-degree home invasion but rather, was sentenced to his term of imprisonment for being an habitual offender. "The habitual-offender statute does not create a substantive offense that is separate from and independent of the principal charge." *People v Oswald (After Remand)*, 188 Mich App 1, 12; 469 NW2d 306 (1991). Additionally, we reject defendant's argument that he was improperly sentenced because his second-degree criminal sexual conduct sentence was consecutive to his first-degree home invasion sentence. He argues that the plain language of MCL 750.110a(8) requires the home invasion sentence to be consecutive to the criminal sexual conduct sentence. This argument is based on a mistaken premise. The trial court did not order the first-degree home invasion sentence to be served before the criminal sexual conduct sentence. It ordered that the sentences be served consecutively to each other without prioritizing those sentences. This was appropriate, *id.*, and the Department of Corrections has apparently treated the second-degree criminal sexual conduct sentence as defendant's first sentence.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto